No. 11-35162

United States Court of Appeals
for the
Ninth Circuit

In the Matter of: BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY,
Appellant,

v.

PETER H. ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NO. 2:10-CV-00929-MJP (HONORABLE MARSHA J. PECHMAN, JUDGE)

BRIEF OF *AMICUS CURIAE*
G. ERIC BRUNSTAD, JR.
IN SUPPORT OF NEITHER PARTY
IN RESPONSE TO THE COURT'S QUESTIONS

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AUTHORITY FOR *AMICUS* AND ISSUES ADDRESSED

On November 4, 2011, this Court invited supplemental briefs by any *amicus curiae* to "address[] the following questions: Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?" *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, No. 11-35162 [Dkt. No. 35] at 1-2 (9th Cir. Nov. 4, 2011). The undersigned *amicus curiae* submits this brief in response to that order, concluding on the first question that Article III of the Constitution prohibits bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance; and concluding on the second question that the bankruptcy court may hear the proceeding and submit proposed findings of fact and conclusions of law to a federal district court in lieu of entering a final judgment, at least in the absence of a proper motion to withdraw the reference.

INTEREST OF THE *AMICUS*[1]

The undersigned *amicus curiae* teaches courses at the Yale Law School on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, federal courts, and argument and reason. He

[1] No party or counsel has authored this brief in whole or in part, nor have they funded its preparation.

began teaching at Yale in 1990 and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author to COLLIER ON BANKRUPTCY, responsible for writing several chapters of the treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has served as counsel of record in numerous bankruptcy matters before the Supreme Court, including *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Supreme Court, including *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010); *Central Va. Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537

U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Supreme Court several amicus briefs in bankruptcy cases, including *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). Additionally, he has briefed and argued numerous bankruptcy matters before this Court, including *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010), *aff'd*, 131 S. Ct. 2594 (2011).

The undersigned is deeply interested in the subject of bankruptcy law and has written, taught, and lectured on the subject of bankruptcy court jurisdiction and the proper limits of the jurisdiction of non-Article III bankruptcy courts pursuant to Article III of the U.S. Constitution. The purpose of this brief is to address the issues the Court identified in its November 4, 2011 order concerning the application of the Supreme Court's recent decision in *Stern v. Marshall* on the authority of bankruptcy courts to adjudicate fraudulent transfer causes of action.

PRELIMINARY STATEMENT

In 1978, Congress enacted a new Bankruptcy Code, created a new system of non-Article III bankruptcy courts, and vested those courts with broad jurisdiction to hear and determine all "civil proceedings arising under title 11 [the Bankruptcy

Code] or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (repealed 1984). In 1982, the Supreme Court invalidated section 1471(b), at least insofar as it authorized the non-Article III bankruptcy courts to finally decide a state law breach of contract action. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982); *see also id.* at 91 (Rehnquist, J., concurring in judgment).

In 1984, Congress responded to *Marathon* by revamping the bankruptcy jurisdictional scheme. In doing so, Congress recast bankruptcy judges as non-Article III "unit[s]" of the district court "to be known as the bankruptcy court for that district," 28 U.S.C. § 151, and enacted 28 U.S.C. §§ 1334(b) and 157 to govern the exercise of federal bankruptcy jurisdiction. In relevant part, section 1334 grants the district courts jurisdiction over all bankruptcy proceedings. 28 U.S.C. § 1334. Section 157(a) then permits the district courts to delegate that authority to the bankruptcy courts in their districts. *Id.* § 157(a). In turn, section 157(b)(1) authorizes a bankruptcy judge to "hear and determine" all "core proceedings arising under title 11, or arising in a case under title 11," subject to ordinary appellate review. *Id.* §§ 157(b)(1), 158.

In contrast, section 157(c)(1) authorizes a bankruptcy judge to "hear" a proceeding that is "related to" a case under title 11, but not to finally decide it. *Id.* § 157(c)(1). For "related to" matters, the bankruptcy judge submits proposed find-

ings of fact and conclusions of law, subject to *de novo* review in the district court. *Id.*

Because bankruptcy judges are not Article III judicial officers, Congress intentionally limited their ability to resolve certain causes of action that the debtor (or bankruptcy trustee) may hold against others. This does not mean that the bankruptcy court can never hear such matters. It simply means that, if the bankruptcy court hears them, it may only address them by submitting to the district court proposed findings of fact and conclusions of law (unless the parties otherwise expressly consent in writing). As the Supreme Court recognized in *Stern v. Marshall*, however, Congress reached too far when including certain causes of action under the "core" category of claims to be fully and finally adjudicated by non-Article III bankruptcy courts. 131 S. Ct. 2594 (2011). In *Stern*, the Supreme Court explained that for at least one of the "core proceedings" listed by Congress in section 157(b)(2), while bankruptcy courts have "the statutory authority to enter judgment on [such an action, they] lack[] the constitutional authority to do so." *Id.* at 2601.

Stern v. Marshall concerned the disposition of the estate of J. Howard Marshall, II ("J. Howard") following his marriage to Vickie Lynn Marshall ("Vickie") and his subsequent death. 131 S. Ct. at 2601. After his death, Vickie allegedly defamed J. Howard's son, E. Pierce Marshall ("Pierce"), and Pierce filed suit against Vickie in state court for defamation. *Marshall v. Stern (In re Marshall)*, 600 F.3d

1037, 1043 & n.10 (9th Cir. 2010), *aff'd*, 131 S. Ct. 2594 (2011). Vickie subsequently filed for bankruptcy, and Pierce filed a proof of claim related to the defamation action. *Id.* Vickie then filed a counterclaim against Pierce, alleging a state-law claim of tortious interference with her expectancy of a gift from J. Howard. *Id.* at 1044-45. Pierce objected to the counterclaim on various grounds, including jurisdiction. *Id.* at 1045.

On September 27, 2000, nearly a year after summarily adjudicating Pierce's defamation proof of claim, the bankruptcy court entered judgment against Pierce on Vickie's tortious interference counterclaim for over $474 million. *Id.* The bankruptcy court relied on section 157(b)(2)(C) to hold that Vickie's counterclaim was a "core proceeding" that could be finally decided by the bankruptcy court because it was a "counterclaim[] by the estate against [a] person[] filing [a] claim[] against the estate." *Stern*, 131 S. Ct. at 2602; 28 U.S.C. § 157(b)(2)(C).

Pierce appealed the $474 million judgment to the district court, contending (among other things) that the bankruptcy court lacked jurisdiction to enter a final judgment on Vickie's counterclaim. *Marshall*, 600 F.3d at 1047-48. The district court agreed and held that despite the "literal language" of section 157(b)(2)(C), the constitutional limits on "core proceedings" made Vickie's counterclaim "non-core" because it was only "somewhat related" to Pierce's defamation claim, and Pierce was entitled to an adjudication of Vickie's allegations in an Article III fo-

rum. *Stern*, 131 S. Ct. at 2602. Accordingly, the district court vacated the bankruptcy court's $474 million judgment. *Marshall*, 600 F.3d at 1048.

Meanwhile, following a five-and-a-half month jury trial, a Texas probate court entered a judgment concluding that Pierce did not owe Vickie anything. *Id.* at 1047. Following the Texas jury trial, the district court imposed its own judgment against Pierce for roughly $89 million. *Id.* at 1048-49. Pierce appealed the $89 million judgment to this Court, and Vickie appealed the district court's decision overturning the bankruptcy court's $474 million award. *Id.* at 1049.

This Court ultimately affirmed the district court's vacatur of the bankruptcy court's $474 million judgment, holding that Vickie's counterclaim was not a "core proceeding" because her counterclaim was "not so closely related to Pierce Marshall's defamation claim that it must be resolved in order to determine the allowance or disallowance of his claim against her bankruptcy estate." *Id.* at 1059. Accordingly, this Court held that the bankruptcy court lacked jurisdiction to issue a final order on Vickie's counterclaim. *Id.* at 1060. As a result, this Court held that the Texas probate court judgment had preclusive effect and barred the district court's subsequent $89 million judgment. *Id.* at 1064-65. The Supreme Court granted certiorari to review the case and ultimately affirmed this Court's decision. *Stern*, 131 S. Ct. at 2620.

While the Supreme Court's decision in *Stern* only addressed a state law

counterclaim to a proof of claim, which the Court held is expressly included as a "core proceeding" under section 157(b)(2)(C), its analysis has broader implications. Read together with the Supreme Court's earlier decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), it is clear that the Supreme Court's decision in *Stern* demonstrates that fraudulent transfer actions cannot be finally adjudicated by non-Article III bankruptcy courts. In *Stern*, the Supreme Court explained that "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts.'" *Stern*, 131 S. Ct. at 2609 (quoting *Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)). Previously, in *Granfinanciera*, the Supreme Court had stated that "[t]here can be little doubt that fraudulent conveyance actions by bankruptcy trustees . . . are quintessentially suits at common law." *Granfinanciera*, 492 U.S. at 56. The Supreme Court made clear in *Stern* that fraudulent transfer actions were entitled to the same Article III protections as the common law counterclaim at issue in that case. Accordingly, though section 157(b)(1)(H) indicates fraudulent transfer actions are "core proceedings," the decisions of the Supreme Court compel the conclusion that although bankruptcy courts have the statutory authority to enter judgment on such actions, they lack the constitutional authority to do so. *Stern*, 131 S. Ct. at 2601.

It is true that where a creditor files a claim in the bankruptcy case, there are some federally created causes of action that a debtor may assert against a creditor that must be adjudicated in order to resolve the creditor's claim, such as a preference action "arising under" section 547 of the Bankruptcy Code. 11 U.S.C. §547; *see also Katchen v. Landy*, 382 U.S. 323 (1966). But as the Supreme Court has made clear, fraudulent transfer actions are not truly federally created causes of action, but rather "quintessentially suits at common law." *Granfinanciera*, 492 U.S. at 56. Accordingly, fraudulent transfer actions may not be finally decided by non-Article III bankruptcy courts absent the express, written consent of the parties.

This is not to say that fraudulent transfer claims cannot be *heard* by non-Article III bankruptcy courts. Because it was unnecessary to the decision, *Stern* did not explicitly address this question. *See Stern*, 131 S. Ct. at 2620 ("Pierce has not argued that the bankruptcy courts 'are barred from 'hearing' all counterclaims' or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that 'finally decide[s]' them."). Nevertheless, the analysis in *Stern* suggests that bankruptcy courts may issue proposed findings of fact and conclusions of law in such matters, at least where no party has properly moved to withdraw the proceeding to the district court.

STATEMENT

On June 1, 2006, the debtor in this dispute, Bellingham Insurance Agency, Inc. ("BIA"), filed for Chapter 7 bankruptcy relief. *Arkison v. Executive Benefits Ins. Agency (In re Bellingham Ins. Agency, Inc.)*, No. 2:10-cv-00929 [Dkt. No. 15] at 4 (W.D. Wash. Jan. 21, 2011) (hereinafter the "USDC Order"). On May 31, 2008, Peter Arkison, the Chapter 7 bankruptcy trustee for BIA (the "Trustee"), filed an adversary complaint against the Appellant, Executive Benefit Insurance Agency ("EBIA"), and several other defendants. *In re Bellingham Ins. Agency, Inc.*, No. 06-11721 [Dkt. No. 149] (Bankr. W.D. Wash. May 31, 2008) (hereinafter the "Trustee's Complaint"). The Trustee's complaint alleged that EBIA and the other defendants had benefited from preferential and fraudulent transfers from the debtor, BIA. *Id.* at 1-2.

On August 6, 2008, EBIA answered the Trustee's complaint and denied the Trustee's assertion that the action to recover estate property was a "core proceeding" over which the Bankruptcy Court had jurisdiction. *Id.* ¶¶ 2.1-2.2, at 2; *In re Bellingham Ins. Agency, Inc.*, No. 06-11721 [Dkt. No. 170] ¶¶ 2.1-2.2, at 2 (Bankr. W.D. Wash. Aug. 6, 2008) (hereinafter the "EBIA's Answer"). On the same date, EBIA filed a separate jury demand. *In re Bellingham Ins. Agency, Inc.*, No. 06-11721 [Dkt. No. 171] at 2 (Bankr. W.D. Wash. August 6, 2008) (hereinafter the "Jury Demand"). While Congress has granted bankruptcy courts the statutory au-

thority to conduct jury trials with the consent of the parties, 28 U.S.C. § 157(e), EBIA specifically withheld its consent to have the jury trial heard in the Bankruptcy Court. Jury Demand at 2. The Bankruptcy Court continued to exercise jurisdiction over the proceedings with respect to pretrial matters but ultimately ordered on December 30, 2009 that the jury trial take place in the District Court. *Arkison v. Executive Benefits Ins. Agency (In re Bellingham Ins. Agency, Inc.)*, No. 08-01132 [Dkt. No. 39] at 2 (Bankr. W.D. Wash. Dec. 31, 2009).

While no party specifically moved to withdraw the reference to the District Court, the Bankruptcy Court's December 30, 2009 order triggered a new proceeding in the District Court that was treated as a motion to withdraw the reference. *Arkison v. Executive Benefits Ins.*, No. 2:10-cv-00171 [Dkt. No. 1] (W.D. Wash. Jan. 28, 2010). In that separate proceeding, the District Court asked the parties to submit a status report indicating what pretrial proceedings should be withdrawn to the District Court. *Arkison v. Executive Benefits Ins.*, No. 2:10-cv-00171 [Dkt. No. 3] (W.D. Wash. Feb. 25, 2010). After none of the parties sought withdrawal of the reference for pretrial proceedings, the District Court ultimately denied the motion to withdraw the reference and dismissed the action following the Bankruptcy Court's intervening grant of summary judgment. *Arkison v. Executive Benefits Ins.*, No. 2:10-cv-00171 [Dkt. No. 8] (W.D. Wash. July 2, 2010).

Specifically, on March 17, 2010, the Trustee filed for summary judgment on

its adversary complaint against EBIA. *Arkison v. Executive Benefits Ins. Agency (In re Bellingham Ins. Agency, Inc.)*, No. 08-01132 [Dkt. No. 42] (Bankr. W.D. Wash. Mar. 17, 2010). Following briefing, the Bankruptcy Court granted the motion on May 27, 2010. *Arkison v. Executive Benefits Ins. Agency (In re Bellingham Ins. Agency, Inc.)*, No. 08-01132 [Dkt. No. 62] at 2 (Bankr. W.D. Wash. May 27, 2010) (hereinafter "USBC Order"). In its order granting summary judgment, the Bankruptcy Court noted that the Trustee "moved for summary judgment under two separate causes of action – 1) that certain transfers were fraudulent in nature and 2) that [EBIA] . . . is a mere successor of the debtor." *Id.* at 2. The Bankruptcy Court then granted the motion "on both causes of action on which the Trustee moved for summary judgment." *Id.* The Bankruptcy Court did not grant the Trustee's motion with respect to any preference claims.

On appeal, the District Court acknowledged that the Bankruptcy Court had "ruled that [EBIA] had engaged in fraudulent transfers and that EBIA was a mere successor to BIA." USDC Order at 4. The District Court then proceeded to conduct a *de novo* review of the Bankruptcy Court's decision and ultimately affirmed on substantially the same grounds. *Id.* at 5-10. EBIA appealed to this Court.

Following the Supreme Court's decision in *Stern v. Marshall*, EBIA moved to vacate the Bankruptcy Court's judgment and remand for trial on the basis that it was unconstitutional for the Bankruptcy Court to have entered summary judgment

on the fraudulent conveyance claims. *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, No. 11-35162 [Dkt. No. 25-1] at 3 (9th Cir. July 22, 2011) (hereinafter "EBIA Motion"). In that motion, EBIA repeatedly represented that it did not file a proof of claim in BIA's bankruptcy proceedings. *Id.* at 3, 8, 10, 13, 14, 17. In response, the Trustee did not contradict those representations, and nothing in the record appears to contradict EBIA's assertions in that regard. *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, No. 11-35162 [Dkt. No. 28-1] at 1-3 (9th Cir. Aug. 2, 2011).

As noted above, on November 4, 2011, this Court issued an order inviting *amici curiae* to address the impact of the Supreme Court's decision in *Stern v. Marshall* on the authority of bankruptcy courts to adjudicate fraudulent transfer actions. This brief is submitted in response to that order.

SUMMARY OF ARGUMENT

The Supreme Court's recent decision in *Stern v. Marshall* reaffirmed its prior conclusion in *Marathon* that there are clear constitutional limits on the authority of bankruptcy courts to adjudicate certain causes of action. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). While Congress attempted to address the constitutional infirmities the Supreme Court noted in *Marathon* by limiting the authority of bankruptcy courts to issue final orders in certain proceedings, *Stern* demonstrates that Congress nevertheless overreached by grant-

ing bankruptcy courts the authority to issue final orders in some of the actions it labeled "core proceedings." When considering their authority to issue final orders, bankruptcy courts must first consider whether they have the statutory authority to issue a final order in a matter before them. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Following *Stern*, bankruptcy courts must also specifically take the additional step of considering whether, in granting statutory authority over a given action, Congress exceeded the bounds of the Constitution.

Though Congress has designated fraudulent conveyance actions as "core proceedings" under section 157(b)(2)(H), the Supreme Court's decisions in *Stern* and *Granfinanciera* demonstrate that the Constitution requires such actions to be finally adjudicated by an Article III court. While Congress is permitted to delegate certain matters to non-Article III tribunals as exceptions to the requirements of Article III, none of the recognized exceptions to Article III apply to fraudulent transfer actions.

Nevertheless, the analysis in *Stern* suggests that bankruptcy courts do have the authority to issue proposed findings of fact and conclusions of law, at least in the absence of a proper motion to withdraw the reference. In fact, the analysis in *Stern* suggests that even where a bankruptcy court issues an improper final order, a *de novo* review by an Article III court may be sufficient to cure the defect. Here, the District Court treated the Bankruptcy Court's final order as proposed findings

of fact and conclusions of law. USDC Order at 5-10. Nothing in *Stern* suggests that the District Court exceeded its authority under Article III of the Constitution in doing so.

ARGUMENT

I. The Constitution Bars a Non-Article III Bankruptcy Court from Finally Adjudicating a Fraudulent Transfer Claim.

The Supreme Court's decision in *Stern v. Marshall* reaffirmed and clarified its prior decision in *Marathon*. Following the 1984 amendments to the Bankruptcy Code, which enacted Congress' "core"/"non-core" jurisdictional response to *Marathon*, lower courts generally considered only the statutory text of the statute when deciding their jurisdiction over a particular matter in bankruptcy. In *Stern*, the Supreme Court re-focused the analysis to include specific consideration of the constitutionality of a bankruptcy court's final adjudication of any particular proceeding. When considering whether it has the necessary jurisdiction to issue a final order in a particular matter, a bankruptcy court must first consider whether it has the statutory authority to do so. If it does, *Stern* further directs the bankruptcy court to consider whether it has the constitutional authority to finally adjudicate a dispute notwithstanding the language of the statute. As explained below, though section 157(b)(2)(H) grants bankruptcy courts the statutory authority to finally adjudicate fraudulent transfer actions, the Constitution prohibits them from doing so.

A. Bankruptcy Courts Have the Statutory Authority to Finally Adjudicate Fraudulent Transfer Claims.

As the Supreme Court has explained, the "jurisdiction of the bankruptcy courts, like all federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). As the Supreme Court has also explained, the relevant statutory scheme unfolds in two phases.

First, under 28 U.S.C. § 1334, Congress vested the federal district courts with "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to a case under [the Code]." *Celotex*, 514 U.S. at 307; *see also Stern v. Marshall*, 131 S. Ct. 2594, 2603 (2011). In relevant part, section 1334 thus prescribes jurisdiction over three categories of matters: (1) civil proceedings "arising under" the Bankruptcy Code; (2) civil proceedings "arising in" a case under the Code; and (3) civil proceedings "related to" the bankruptcy case. *Stern*, 131 S. Ct. at 2603.

Second, under 28 U.S.C. § 157(a), the district courts may refer "any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Code] . . . to the bankruptcy judges for the district." *Celotex*, 514 U.S. at 307; *see also Stern*, 131 S. Ct. at 2603. In relevant part, section 157(a) thus delegates the district courts' jurisdiction to the bankruptcy courts. In turn, the next two provisions of section 157 – sections 157(b) & (c) – divide the bankruptcy court's exercise of its delegated jurisdiction into two categories: (1) "final order"

jurisdiction under section 157(b)(1) over "core proceedings" that either "arise under" the Bankruptcy Code or "arise in" a case under the Code; and (2) "non-final order" jurisdiction under section 157(c) over "non-core" matters that are "related to" a bankruptcy case as to which a bankruptcy court is authorized to enter proposed findings of fact and conclusions of law, unless the parties expressly consent in writing to the bankruptcy court's final resolution of the matter.

Under the terms of the statute, where a matter is a "core proceeding" that may be finally resolved by a bankruptcy court, the parties may appeal the final order to the district court, which will review it pursuant to traditional appellate standards. 28 U.S.C. §§ 157(a), 158; *Stern*, 131 S. Ct. at 2603-04. Where a matter is not a "core proceeding" and a party objects, the district court must enter the final order only after it has conducted a *de novo* review of the bankruptcy court's proposed findings of fact and conclusions of law. *Stern*, 131 S. Ct. at 2604.

According to the statute and the Supreme Court's interpretation of it, "core proceedings" include but are not limited to sixteen different types of matters, including specifically "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. § 157(b)(2)(H). In *Stern*, the Supreme Court rejected the argument that Congress' use of "arising in" and "arising under" language limited the breadth of the "core" categories as a matter of statutory interpretation. 131 S. Ct. at 2604-05. As a result, if a particular proceeding fits within the literal language of

a particular "core" category under section 157(b)(2), *Stern* indicates that bankruptcy courts have the statutory authority to finally adjudicate it. *Id.* In this case, the Trustee's fraudulent transfer action falls within the literal language of section 157(b)(2)(H). Accordingly, the Trustee's fraudulent transfer action is a "core proceeding" under the statutory scheme set forth by Congress, and the Bankruptcy Court below had the *statutory* authority to issue a final order resolving it.

B. The Supreme Court's Decisions in *Stern* and *Granfinanciera* Demonstrate that Congress Impermissibly Granted Bankruptcy Courts the Statutory Authority to Issue Final Orders Resolving Fraudulent Transfer Actions.

Although section 157(b)(2)(H) provides that "proceedings to determine, avoid, or recover fraudulent conveyances" are "core proceedings" over which a bankruptcy court is statutorily permitted to issue a final order, 28 U.S.C. § 157(b)(2)(H), that is not the end of the analysis. In addition to determining whether the bankruptcy court has the statutory authority to finally adjudicate a given matter, *Stern* requires the court to determine whether it also has the *constitutional* authority to do so. *Stern*, 131 S. Ct. at 2608.

Article III, section 1 of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1; *Stern*, 131 S. Ct. at 2608. It further provides that the judges of those courts "shall hold their Offices during good Behaviour" and "receive for their Ser-

vices[] a Compensation[] [that] shall not be diminished" during their tenure. U.S. CONST. art. III, § 1; *Stern*, 131 S. Ct. at 2608. As the Supreme Court explained, Article III protects the liberty of individuals "not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern*, 131 S. Ct. at 2609.

Article III requires federal judicial power to be exercised only by a judge with the constitutional protections of life tenure and irreducible salary, and it could not serve its purpose "if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* That is why the Supreme Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Id.* (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 18 How. 272, 284 (1855)). Although there are exceptions to the general rule, they remain relatively narrow.

In *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Supreme Court first acknowledged the existence of a class of cases "involving public rights" that "[C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." 59 U.S. 272, 18 How. 272, 284 (1855). The Court emphasized, however, that Congress may not "withdraw from judicial

cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.* As the Court recognized, the Constitution requires that such matters of private right be decided by Article III judges if litigated in federal court. As the Supreme Court recently explained, *Murray's Lessee* provides that "Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all," *Stern*, 131 S. Ct. at 2612, but it does not permit the adjudication of matters of private right.

Since *Murray's Lessee*, the Court has redefined the boundaries of the "public rights" exception in a series of cases that do not permit an easy synthesis. Some cases have stated that "a matter of public rights must at a minimum arise 'between the government and others.'" *E.g. Marathon*, 458 U.S. at 69 (plurality). More recently, the Court rejected the conclusion "that the right to an Article III forum is absolute unless the Federal Government is a party of record." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586 (1985). Instead, the Court recognized that, in rare cases, Congress "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 594.

The Supreme Court has made clear, however, that even this broadened category of "public rights" captures only rights created by Congress. As the Court ex-

plained in *Granfinanciera*, "[t]he crucial question, in cases not involving the Federal Government, is whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera*, 492 U.S. at 54 (brackets and internal quotation marks omitted). As the Supreme Court explained in *Stern*, "it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Stern*, 131 S. Ct. at 2613.

In contrast, as the Supreme Court explained in *Marathon*, and reaffirmed in *Stern*, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern*, 131 S. Ct. at 2609 (quoting *Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)). As the Court's decisions in *Granfinanciera* and *Stern* have recognized, "[t]here can be little doubt that fraudulent conveyance actions by bankruptcy trustees . . . are quintessentially suits at common law." *Granfinanciera*, 492 U.S. at 56; *see also Stern*, 131 S. Ct. at 2614. Accordingly, under these precedents, fraudulent conveyance actions cannot be fi-

nally adjudicated by non-Article III bankruptcy courts without running afoul of the Constitution.

In *Granfinanciera*, the trustee of a corporation undergoing Chapter 11 reorganization filed suit against the petitioners for allegedly fraudulent monetary conveyances. 492 U.S. at 36. The bankruptcy court denied the petitioners' request for a jury trial because it regarded the fraudulent transfer suit as a "core action" that was a "non-jury issue" under English common law. *Id.* at 37. The Supreme Court ultimately granted certiorari "to decide whether petitioners were entitled to a jury trial." *Id.* at 38. In deciding that the petitioners were entitled to a jury trial, the Court reasoned that fraudulent conveyance suits were "not closely intertwined with a federal regulatory program Congress has power to enact" because such suits "were quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 54, 56. Accordingly, the Court "concluded that fraudulent conveyance actions were 'more accurately characterized as a private rather than a public right as [the Court has] used those terms in [its] Article III decisions.'" *Stern*, 131 S. Ct. at 2614 (quoting *Granfinanciera*, 492 U.S. at 55).

While the *Granfinanciera* decision set out to address the Seventh Amendment jury trial issue, as *Stern* demonstrates, it also resolved the Article III issue.

Id. Recognizing this, *Stern* not only reaffirmed and expanded upon *Granfinanciera*, it effectively tied the two decisions together. For example, the Supreme Court explicitly stated that "Vickie's counterclaim – like the fraudulent conveyance claim at issue in *Granfinanciera* – does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Id.* It further stated that "Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate – the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court." *Id.* at 2616; *see also id.* at 2618 ("We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*.").

In light of *Stern* and *Granfinanciera*, the Supreme Court clearly regards fraudulent transfer actions to be "quintessential[] suits at common law" that must be adjudicated by an Article III court. *Stern*, 131 S. Ct. at 2614; *Granfinanciera*, 492 U.S. at 56. This is particularly so given the Supreme Court's admonition that "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Stern*, 131 S. Ct. at 2618 (quoting *Marathon*, 458 U.S. at 69 n.23).

In this case, the Trustee brought a fraudulent transfer action against EBIA. Trustee's Complaint at 1-2. The Bankruptcy Court issued a final order with re-

spect to that action. USBC Order at 2. *Stern* and *Granfinanciera* demonstrate that the Bankruptcy Court lacked the constitutional authority to do so. Nevertheless, the District Court rectified that error by treating the Bankruptcy Court's decision as merely the submission of proposed findings of fact and conclusions of law subject to *de novo* review, as discussed below.

Additionally, as noted above, it does not appear that EBIA filed a proof of claim in the bankruptcy proceedings below, so the Court need not address that aspect of the analysis in *Stern*. EBIA Motion at 3, 8, 10, 13, 14, 17. Even if EBIA had filed a claim, however, the Bankruptcy Court would still have been unable to issue a final order on the Trustee's fraudulent transfer action unless that action would necessarily be resolved in the process of ruling on EBIA's proof of claim. *See Stern*, 131 S. Ct. at 2620.

While the Supreme Court has held that, under certain circumstances, a party can waive his or her rights under Article III, the filing of a claim is insufficient to constitute such a waiver. In *Commodity Futures Trading Comm'n v. Schor*, the Court concluded that a party (Schor) waived his right to have an Article III tribunal decide a counterclaim against him when he "elect[ed] to forgo his right to proceed in state or federal court on his claim" and instead proceeded in an administrative tribunal within the Commodity Futures Trading Commission. 478 U.S. 833, 849 (1986). The Court concluded that by filing his claim before the CFTC, "Schor ef-

fectively agreed to an adjudication by the CFTC of the entire controversy," including counterclaims, in that forum. *Id.* at 850. As the Court emphasized, "Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but . . . chose to avail himself of the quicker and less expensive procedure Congress had provided him." *Id.*

No similar justification applies with respect to proofs of claim in bankruptcy because there is no other forum in which a creditor can pursue his or her claim against the bankruptcy estate. A creditor is required to file a proof of claim in bankruptcy if he or she wishes to secure a pro rata share of the estate. The Supreme Court recognized precisely this feature of bankruptcy in *Granfinanciera*: "[In *Schor*] [t]he investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress had created, the Court said, the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court. Parallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims." 492 U.S. at 59 n.14 (citation omitted). The Court reaffirmed this position in *Stern*, explaining that "Pierce did not truly consent to resolution of Vickie's claim in bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate." 131 S. Ct. at 2614.

II. The Bankruptcy Court Could Hear the Proceedings and Submit Proposed Findings of Fact and Conclusions of Law in Lieu of a Final Judgment.

Adherence to the commands of Article III does not necessarily mean that bankruptcy courts are barred from "hearing" all fraudulent transfer claims. The Supreme Court's decision in *Stern* does not specifically resolve this issue, as it was not necessary to the disposition of that case, but the decision suggests that Article III simply limits the bankruptcy courts' ability to *finally* decide such actions, at least where no party has properly sought to withdraw the proceeding to the district court. *See Stern*, 131 S. Ct. at 2620. In addition, where a timely jury demand is made and the parties have not consented to have the bankruptcy court try the matter to a jury, trial must be conducted in the district court. In this case, however, the matter was disposed of on motion for summary judgment.

As discussed above, the statutory framework of section 157 envisions two kinds of proceedings: "core" and "non-core." For "core" proceedings, the statute contemplates final binding adjudication by the non-Article III bankruptcy courts. 28 U.S.C. § 157(b). For "non-core" proceedings, the statute contemplates that the non-Article III bankruptcy courts will at most submit proposed findings of fact and conclusions of law to the Article III district courts. *Id.* § 157(c). While it did not expressly address the issue, the implication of *Stern* is that for "core proceedings" that cannot be finally adjudicated by a non-Article III bankruptcy court, the proper

procedure is for the bankruptcy court to treat such actions as "non-core" matters and issue proposed findings of fact and conclusions of law for *de novo* review in the district court. *See Stern*, 131 S. Ct. at 2619-20.

This result is authorized by section 1334, which vests complete bankruptcy jurisdiction in the district courts, and section 157(a), which permits delegation to the bankruptcy courts. In addition, it would do the least violence to the overall statutory scheme because it would simply place "core" proceedings that constitutionally should be treated as "non-core" matters in the separate statutory "non-core" category under section 157(c). 28 U.S.C. § 157(c).

Further, the Court's comments in *Stern* suggest precisely this remedy. In responding to the dissent's arguments regarding the potentially devastating impact of the Court's decision on the administration of bankruptcy cases, the majority in *Stern* explained that "the current bankruptcy system also requires the district court to review *de novo* and enter final judgment on any matters that are 'related to' the bankruptcy proceedings." 131 S. Ct. at 2620. It stressed that "Pierce ha[d] not argued that the bankruptcy courts 'are barred from 'hearing' all counterclaims' or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that 'finally decide[s]' them." *Id.* In light of those facts, the majority "d[id] not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the

current statute." *Id.* Of course, this is only true – the division of labor is not meaningfully changed – if bankruptcy courts may continue to hear such claims and issue proposed findings of fact and conclusions of law, subject to *de novo* review in the district court.

On this basis, the fairest reading of *Stern* is that "core proceedings" that cannot be finally resolved by bankruptcy courts consistent with the constitutional requirements of Article III should be treated as "non-core proceedings" under section 157(c). While section 157(c) provides for the entry of a final order with the consent of the parties in "non-core proceedings," such consent must be express and written. FED. R. BANKR. P. 7012(b). Accordingly, absent the express written consent of the parties, bankruptcy courts can only address fraudulent transfer actions by submitting proposed findings of fact and conclusions of law to the district courts.

In this dispute, EBIA did not expressly consent to have the Bankruptcy Court finally resolve the Trustee's fraudulent transfer claim. Trustee's Complaint ¶¶ 2.1-2.2, at 2; EBIA's Answer ¶¶ 2.1-2.2, at 2. Accordingly, the Bankruptcy Court lacked the constitutional authority to finally adjudicate the Trustee's fraudulent transfer action. In spite of the Bankruptcy Court's issuance of a final order, however, the District Court reviewed the decision of the Bankruptcy Court *de novo*. USDC Order at 5. In doing so, it essentially treated the Bankruptcy Court's

decision as proposed findings of fact and conclusions of law as contemplated by section 157(c). In *Stern*, the district court adopted the same approach. *See Stern*, 131 S. Ct. at 2602; *Marshall*, 600 F.3d at 1048. Because the Bankruptcy Court's decision here was reviewed *de novo* by the District Court as if it were proposed findings of fact and conclusions of law, and no party sought to withdraw the reference, EBIA's motion to vacate the Bankruptcy Court's order and remand for trial should be denied.

CONCLUSION

Article III of the Constitution prohibits bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance. Nevertheless, a bankruptcy court may hear a fraudulent transfer proceeding and submit proposed findings of fact and conclusions of law to a federal district court in lieu of entering a final judgment, at least in the absence of a proper motion to withdraw the reference.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The foregoing brief contains 6,997 words of Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

/s/ *Collin O'Connor Udell*
Collin O'Connor Udell

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ G. Eric Brunstad, Jr.
G. Eric Brunstad, Jr.

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